SUPREME COURT, U. S.

JUN. 9 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1379

WALTER HUMPHREY,
DONALD V. MALONE,
ROBERT KAIWAT and
MARION A. SACKSTEDER, - - - Petitioners,

versus

DEALERS TRANSPORT COMPANY and
E & L TRANSPORT COMPANY, - - Respondents.

Response of Dealers Transport Company to the Petition for a Writ of Certiorari.

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Response of Dealers Transport Company to the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED.

Respondent accepts the Questions Presented as stated by Petitioners; however, they deny that there was any breach of contract as alleged in Question I. In addition, Respondent denies that it failed to perform any obligation required by *Humphrey* v. *Moore,* 375 U. S. 335 or that it was guilty of any "contributory fault" as alleged in Question II. The opinion of the District Court supports Respondent's position.

STATEMENT OF THE CASE.

The facts of the present case are accurately stated in *Humphrey* v. *Moore,* 375 U. S. 335, and in the District Court's Findings of Facts and Conclusions of Law (App., pp. 32a-38a).[1] In addition, the synopsis of facts contained in the Petitioner's Brief is an accurate statement of the Petitioner's position in the present case.

Several additional facts should be brought to this Court's attention. The Petitioners are the former employees of E & L Transport Company and they are now employees of Dealer's Transport Company. They became employees of Dealers pursuant to the Supreme Court decision in *Humphrey* v. *Moore, supra.*

Dealers Transport Company in its answer to the Petitioners original complaint, pled three affirmative defenses. First that the permanent injunction issued by the Court of Appeals of Kentucky made it impossible for Dealers to carry out the decision of the Joint Grievance Committee; namely, to dovetail the seniority lists of E & L Transport Company and Dealers Transport Company. Said dovetailing process was being carried out at the time that Dealers was enjoined.

Secondly, Dealers pled that it was neutral throughout the *Humphrey* v. *Moore* litigation. They were neutral before the issuance of the injunction and afterwards.

Finally, Dealers pled that it was under no duty to act other than as a neutral party during the *Humphrey*

[1]The Respondent will use the Court of Appeals citation to the appendix, as did the Petitioner, and it will be cited throughout this brief as "App.," unless otherwise designated.

v. *Moore* litigation; but that even if it were under a duty to have acted in a manner other than it did, said acts would have been futile because Petitioners were adequately represented at all stages of the *Humphrey* v. *Moore* litigation (App., pp. 24a-26a).

It has been the position of Dealers from the outset that the Supreme Court decision in *Humphrey* v. *Moore* was dispositive of this present action. Dealers took the position that *Humphrey* v. *Moore* supported each of its aforesaid affirmative defenses and the District Court so held in its Findings of Fact and Conclusions of Law.

ARGUMENT.

I.

Whether It Is Compatible With Section 301 of the Labor Management Relations Act, 1947, to Deny Recovery to Victims of a Breach of Contract on the Theory That They Are Required to Estabilsh That the Injury Would Not Have Occurred But for the Breach?

It has been the Petitioners' position from the outset that the alleged antecedent fraud of the Respondents was responsible for all events that occurred thereafter. Petitioners have not changed their theory, however, in an attempt to create an issue to be reviewed by this Court they have shifted their emphasis. The Petitioners are apparently arguing that the alleged conduct of the Respondents was an unfair labor practice and that such conduct automatically amounts to a breach of contract and is subject to Section 301(a) jurisdiction. Furthermore, Petitioners argue that they do not have to prove that this conduct was in any way responsible

for the ensuing events. Rather they argue that the Respondents must prove the negative, namely, that the antecedent conduct was in no way responsible for the ensuing *Humphrey* v. *Moore* litigation.

Petitioners rest their argument on one sentence of the District Court's opinion which is as follows: "It would be stretching the imagination to rule as a matter of law that but for said alleged fraud no law suits would have been filed" (Petitioners' App. B, p. 13a).

Petitioners completely overlook the full meaning of the District Court's opinion. The basis of that opinion was that even if the Respondents were initially guilty of fraud, that prior to the hearing before the Joint Grievance Committee, all of the relevant and important facts necessary for determining the issues were known by all of the parties involved and were presented to the Committee. This interpretation was based upon the decision of *Humphrey* v. *Moore*.

Petitioners argue that the failure of the Respondents to disclose amounted to a breach of contract "by the express provisions of § 8(a)(5) and 8(d) of the Act which 'are part of the federal law of labor agreements' " (Petitioners' Brief, p. 12). Petitioners take this approach in an attempt to avoid having to prove that the Respondents' initial alleged conduct was in any way responsible for the ultimate issuance of an injunction. Of course, it is elementary that neither this court, nor any court, has held that an unfair labor practice automatically constitutes a breach of contract. Such a theory would completely destroy the pre-emptive jurisdiction of the National Labor Relations

Board. Obviously some unfair labor practices can also be a breach of contract; however, in those cases where 301 jurisdiction has been found there has been alleged a specific breach of the particular contract. The absurdity of adopting a rule that would make all unfair labor practices subject to a 301 suit is obvious from the facts of the present case.

Petitioners attempt to sustain their theory that the burden of proof should be upon the Respondents instead of the Petitioners by citing *NLRB* v. *C.&C. Plywood Corp.*, 385 U. S. 421 (Petitioners' Brief, p. 2). This case did not involve fraud. It was a refusal to negotiate a premium pay plan which was instituted by the employer without consulting the union in violation of the collective bargaining agreement which was in effect.

The union filed an unfair labor practice and the company claimed that the National Labor Relations Board was without jurisdiction on this issue because a breach of contract was involved. This court found that a breach of contract could be an unfair labor practice in some instances. Petitioners now ask for the converse even though no unfair labor practice has been proven or for that matter charged. The *C.&C. Plywood* case held that the National Labor Relations Board did not have general "power to determine the rights of parties under all collective bargaining agreements . . ." (p. 427). Accordingly an unfair labor practice does not in any way establish a breach of contract. Perhaps both will exist under a certain set of facts, but a breach

of contract action can only be established by competent proof in that particular action.

The true basis of the Petitioners' complaint is an action based upon fraud. There is no reason why the Petitioners should not have to prove that there were false representations made by the Respondents and that they relied upon them to their detriment. The Petitioners should not be allowed to maintain a breach of contract action on the theory of fraudulent misrepresenation unless they can sustain the typical elements of fraud.

The opinion of the District Court recognizes that the Petitioners did not rely upon the alleged misrepresentations and that when the Joint Grievance Committee reached its decision it had heard all of the relevant facts.

The true basis of the District Court's Opinion can be seen in the first paragraph of its Conclusions of Law:

> "It is the finding of this Court that even if the defendants, Dealers Transport Company and E & L Transport, were guilty of fraud as alleged by the plaintiffs, said misrepresentations were adequately discovered by the plaintiffs and/or their representatives in advance of the Joint Grievance Committee hearing in Detroit. As a result, the plaintiffs were in no way misled by said fraud, they did not rely to their detriment on such statements, and any possible adverse effects said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and equitable" (Petitioners' App. B, pp. 12a-13a).

It must be remembered, and Petitioners do not argue to the contrary, that the alleged misrepresentations were in no way relied upon by the Petitioners. Proof of this is the fact that the E & L employees, these Petitioners, filed a grievance immediately upon being informed that E & L Transport Company was withdrawing from Louisville (E & L App., 6th Circuit, p. 1b). Obviously the Petitioners in no way relied upon any alleged misrepresentations by the management of E & L or Dealers Transport. From the date of the initial grivance the E & L employees took a position contrary to the alleged misrepresentations and contended, successfully, that there was an absorption between the two companies.

Petitioners can not sustain their position unless it can be held as a matter of law that the Respondents' alleged initial misconduct constituted a *per se* breach of contract. If subsequent disclosure of all facts, and nonreliance upon the alleged misconduct, is a valid defense then the Petitioners have no standing in court. The District Court so held and the fundamental reasoning contained in its opinion should be sustained by this court.

II.

Whether Non-Performance of Obligations affirmed in *Humphrey* v. *Moore*, 375 U. S. 335, Is Excused by the State Court Injunction, Therein Reversed, Although the Employer-Obligor Was Not Free of Contributory Fault?

The Petitioner in its brief (p. 18) accurately states the position of the District Court relative to the above issue. Petitioners then argue, however, that such a position warrants review by this Court on two counts, both of which are enumerated in their brief. The first question involves an attack upon the position that Dealers took following the Joint Grievance Committee's decision. Petitioners have alleged throughout that the Respondents' initial contributory fault formed a basis for the issuance of the injunction, but the District Court did not so hold. At best the District Court held that even if there were initial misconduct that it was cured by the full disclosure and hearing before the Joint Grievance Committee.

Keeping the above in mind, it is Respondents' very strong position that the action of Dealers Transport was proper and necessary.

First of all, Dealers Transport was in the process of sandwiching the two seniority boards, and had as a practical matter accomplished same, when the injunction was issued by the Kentucky Court of Appeals.

Petitioners take the position that *Humphrey* v. *Moore* in no way approves of the position taken by Dealers because the only issue in that case was the fraud or unfair representation of the union. Respond-

ents and the District Court believe that such an interpretation is overly restricted. The Kentucky Court of Appeals and the Supreme Court recognized that Dealers was itself essentially neutral. As stated in *Humphrey* v. *Moore,* "No fraud is charged against the employer; . . . The fair inference from the complaint is that the employer considered the dispute a matter for the Union to decide." 375 U. S. 335, 343.

Petitioners next contend that the decision of the Second Circuit in *Seedman* v. *Friedman,* 132 F. 2d 290, is in conflict with the lower court's opinion. In that case a debtor and a creditor's committee entered into an agreement under the Bankruptcy Act. The confirmation of the agreement was procured by fraud on behalf of the debtor and the committee. After receiving confirmation, the committee found that it could realize a greater profit, and the referee in bankruptcy "permanently restrained and enjoined" the proposed sale to the claimant. The Court held that the fraud of the debtor and the committee prevented them from taking advantage of the injunction that prevented the sale to the claimant. The claimant was allowed to recover for breach of this contract.

The *Seedman* case stands for the proposition that the rule which excuses performance because of an injunction "is not applied where the fault of the party owing performance under the contract contributes to the order" (p. 296).

Respondent has no argument with such a rule. It would be absurd, however, to extend that rule to the facts of the present case. Unlike the debtor and his

committee, Dealers did not enter into a contract, which was founded upon fraud, with a third party. Dealers was ordered to perform by the Committee and then enjoined from performance by the Court of Appeals. Dealers was not responsible for either decision. This factual distinction is the key difference between the present case and the line of authority expounded in *Seedman*. Dealers is entitled to apply the general rule of law that an injunction does excuse performance.

The law is well settled that an act of law, including a court order, rendering performance of a contract impossible, is a defense to an action for damages for non-performance. *Fritz-Rumer-Cooke Co.*, 279 F. 2d 200 (C.A. 6th, 1960).

There is an overriding similarity in all of the cases and Hornbook citations which hold that "impossibility" is not a defense. The one main ingredient is that the promissor himself took some step to render his performance impossible. Dealers Transport did everything that every tribunal told it to do. It obeyed the decision of the Joint Grievance Committee. It stopped doing that when the Court of Appeals said for it to stop. It then implemented that decision when the Supreme Court so ruled.

Petitioners were successful in *Humphrey* v. *Moore*, and now they want to enrich themselves at the expense of their present employer, who was unwillingly trapped between two employee groups. The District Court recognized the absurd inequity in the Petitioners' law suit, and followed sound legal principles in dismissing same.

There are several allied arguments relative to this particular issue. It must be remembered that Dealers Transport was a party to the *Humphrey* v. *Moore* litigation, but at no time were any of the allegations of this suit raised in that earlier action. Since we are re-litigating the same facts that existed in *Humphrey* v. *Moore* it is the Respondent's position that that case is *res judicata* to the present law suit. In addition, the Petitioners, when they were discharged by Dealers pursuant to the injunction of the Kentucky Court of Appeals, should have filed a grievance under the collective bargaining agreement if they believed that their contractual rights had been violated. They did not do so and for this reason they are precluded from bringing a 301 action because they did not exhaust their contractual remedies. *Republic Steel Corporation* v. *Maddox,* 379 U. S. 650 (1964).

Finally, it is Dealers position that they were justified in being neutral and that it would have been futile for them to have taken a more active role in the *Humphrey* v. *Moore* litigation. This Court must realize that the two employee groups who were locked in combat in *Humphrey* v. *Moore* were represented by outstanding legal counsel. In fact the Petitioners were so well represented that they were successful before this Court. It is impossible to see how a more aggressive role by Dealers could have resulted in any greater benefit to these Petitioners. Petitioners argue that Dealers is not entitled to use the injunction as a defense because it did not seek to dissolve the injunction. The Petitioners, however, were parties to the injunction proceed-

ings, and they diligently, without success initially, defended against the issuance and continuance of the injunction, demonstrating the futility of the Respondent for duplicating those efforts. Petitioners can not profit from their own inability to secure immediate dissolution by charging that Dealers did not duplicate their futile efforts.

An excellent discussion of this rule is found in the case of *Chicago, B & O R. Co.* v. *Fowler,* 224 M.A. 736, 27 S. W. 2d 72 (1930). In that case the Court stated *inter alia:*

> "If the real party in interest could not succeed in obtaining a further or different order of court at the time, what measure of success could the bailee or railroad company hope to have in a like undertaking?"

It is clear that Dealers Transport Company was not derelict in its duties to either employee group by taking a neutral position. Both groups were adequately represented and anymore active participation by Dealers would have been futile.

CONCLUSION.

The facts of the present case are not in dispute for they were determined as such in *Humphrey* v. *Moore.* They show that the Petitioners neither relied upon nor suffered any damage as a result of the alleged misrepresentation. Realizing this, the Petitioners should not be allowed to establish a breach of contract based upon the alleged antecedent misconduct of the Respondents.

Petitioners should be forced as are all other litigants to show that they were damaged by having relied upon said alleged conduct. This, of course, they can not do and the lower court has so held.

The issues of this case were disposed of in *Humphrey* v. *Moore* and that case is a bar to this suit. The Petitioners have not alleged any breach of contract nor the exhaustion of the grievance procedure set out in the contract, both of which are fatal to an action under 301 of the Labor Management Relations Act.

Respondents' neutrality and its obeyance of the injunction was proper and necessary conduct, and can not form a basis for Petitioners' cause of action.

The petition should be denied therefore affirming the decision of the District and Appellate Courts.

Respectfully submitted,

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